CHAPTER 21

THE JUDICIARY AND THE BAR (CIVIL)[1]

The judiciary, besides hearing and determining civil and criminal matters, is empowered to decide the legality of any legislative or executive acts. The members of judiciary are appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister and after consultation with the Conference of Rulers. In light of the above, this chapter discusses the legal profession and practice in the civil courts in Malaysia. It begins by identifying the role and functions of judges, their appointments, conduct and etiquette; and the qualifications and requirements for admission to the Bar in Malaysia as an Advocate and Solicitor. Further, the discussion encompasses the bodies that regulate professional practice and etiquette in Malaysia such as the disciplinary board, the Bar Council and the State Bar Committee. The discussion will also encompass the functions of the Legal Profession Qualifying Board Malaysia.

21.1 INTRODUCTION – THE MALAYSIAN JUDICIARY

There are three branches of governing bodies i.e. the executive, legislative and the judiciary. This is in accordance with the doctrine of separation of powers. Even though this political doctrine is not provided for in the Federal Constitution, it has surely influenced the framers of the Constitution[2] and ensured the practice of democracy in the country.

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1 This chapter is contributed by Ashgar Ali Ali Mohamed and Hanifah Haydar Ali Tajuddin.

2 Abdul Hamid Mohamad PCA (as he then was) in the case *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 at p. 353-354, [2008] 1 MLJ 1, FC at p. 5-16 discussed on the doctrine of separation as a political doctrine devised by French enlightenment thinker Baron de Montesquieu where the legislative, executive and judicial branches of government are kept distinct, to prevent power abuse.

Under the doctrine of separation of powers,[3] as practised in any other democratic countries, each governing body is kept distinct from the other so as to enable check and balance of the body and to avoid any abuse of power. Thus, each of them is vested with special powers where parliament legislates the laws, the executive implements the laws, and the judiciary engages in the interpretation and enforcement of all laws.[4]

The judiciary is the third governing body and occasionally, termed as the 'weakest' or the 'least dangerous' branch of the government.[5] This is possibly due to the infamous powers of the first two governing bodies which might to some extent undermine the real functions and roles of the judiciary. In fact, the judiciary is a governing body with a huge responsibility especially in reflecting a just and equal country that includes upholding the rights of the oppressed and sanctioning the penalties on the culprits.

The doctrine of basic structure which has gained widespread acceptance in India in cases such as *Kesavananda Bharati v. State of Kerala*,[6] *Indira Nehru Gandhi v. Raj Narain*,[7] and *Minerva Mills v. Union of India*,[8] among others, and endorsed by our Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia*,[9] *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case*,[10] *and Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals*,[11] dictates, *inter alia*, that the judicial review power of the court

3 *Ibid.*

4 See Mahaletchumi Balakrishnan 'The Judiciary and the Lost Doctrine of Separation of Powers' the Malaysian Bar (2010) viewed from http://www.malaysianbar.org.my/ index2.php?option=com_content&do_pdf=1&id=27952

5 HP Lee in 'the Judicial Power and Constitutional Government - Convergence and Divergence in the Australian and Malaysian Experience' Journal of Malaysian and Comparative Law [2005] JMCL 1 viewed from http://www.commonlii.org/my/journals/ JMCL/2005/1.html#fn12

6 [1973] SCR Supp 1; AIR [1973] SC 1461

7 [1975] SC 2299.

8 AIR 1980 SC 1789.

9 [2010] 3 CLJ 507.

10 [2017] 5 CLJ 526.

11 [2018] 3 CLJ 145, FC.

is essential to the constitutional role of the courts and inherent in the basic structure of the Constitution. The judiciary is thus empowered to strike down an amendment to the Constitution and Acts enacted by the Parliament which conflict with or seek to alter the basic structure of the Constitution. In *Indira Gandhi*'s case, the Federal Court noted that it is inaccurate to state that art. 121(1A) of the Federal Constitution excludes or ousts the Civil courts jurisdiction on matters within the jurisdiction of the Syariah court. In this case, the Federal Court decreed that the Civil courts had jurisdiction to hear cases when aggrieved parties questioned issue relating to conversion to Islam. Again, in *Bank Kerjasama Rakyat Malaysia Bhd v. Koperasi Amanah Pelaburan Bhd*,[12] it was held, *inter alia*, that s. 82(1)(d), (3)(c), (5) and (7) of the Co-operative Societies Act 1948 had altered the basic structure of the Constitution regarding the court's exclusive judicial power to decide disputes under art. 121(1) of the Federal Constitution and thus, by virtue of art. 4(1) of the Constitution, the above provisions are void to the extent of the encroachment. Lastly, in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal*,[13] it was held, *inter alia*, that the power of the Attorney General to grant or refuse consent under s. 9(1) of the Government Proceedings Act 1956 was amenable to judicial review.

Be that as it may, when discussing about the judiciary, one would incline to discuss about the impartiality of the system. Thus, it is very important that the responsibility of upholding justice should not be solely given to the judiciary; another party should as well be monitoring with the ability to say if justice is misused or misplaced from time to time. The other party is the legal practitioners i.e. the lawyers. As in Malaysia, the judiciary and the legal profession have gone through many changes in the different phases of its development in so many years. One of the incidents that has brought major change to the judiciary and indirectly has as well effected the legal profession was the 1988 Malaysian constitutional crisis.

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12 [2019] 1 LNS 1099.

13 [2019] 4 CLJ 561 FC.

The Malaysian judiciary is founded on art. 121(1) of the Federal Constitution which establishes two High Courts of co-ordinate jurisdiction and status: the High Court of Malaya and the High Court of Sabah and Sarawak. However, part of the clause was deleted with the deletion of the term '*The judicial power of the federation shall be vested in a Supreme Court*'. The amendment has caused many especially the legal practitioners to criticise on the fact that the deletion of the term 'judicial power' has led to confusion and understanding that the judiciary was no longer impartial and that its jurisdiction and powers will be 'conferred by or under the federal laws.' This implies the limitation of the judicial power by the legislature. Over the years, the issue is recurrently raised and there is even a call to amend the current clause of art. 121(1) to restore the term 'judicial power'. This is to ensure that the judiciary would not be influenced by the other governing bodies, i.e. the executive and especially the legislative.[14] However, some may opine that the removal of the term 'judicial power' did not affect the impartiality of judiciary as the legislature is the body which makes the laws and that the amendment has made it clear that the judiciary's power does not include the power of legislating laws. Nevertheless, the Malaysian Bar from time to time has called for another amendment to the article so that the term 'judicial power' be inserted again as it was prior to 1988.[15]

Despite the comments and critics, the Malaysian judiciary nonetheless continues to develop. Some of the current developments required the 'mixing' to certain extent between the judiciary with other governing bodies. For example, the amendment to s. 56 of the new Central Bank of Malaysia Act 2009 has made the reference by the presiding judge to the Shariah Advisory Council (SAC) mandatory when deciding on matters relating to Shariah in Islamic banking cases. An argument was

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14 See 'The Malaysian Bar's Request for Amendment to Article 121(1) of the Federal Constitution,' (2012) viewed at http://www.malaysianbar.org.my/ bar_news/ berita_badan_peguam/the_malaysian_bars_request_for_amendment_to_ article_1211_of_the_federal_constitution.html

15 For further reading, refer to 'The Malaysian Bar's Request for Amendment to Article 121(1) of the Federal Constitution,' *ibid.*

put forward in an article[16] where it was discussed that by obliging the court to make the reference to the SAC in the related matters and that the ruling will be binding upon the court[17] is in reality, an enforcement of the decision of the executive (i.e. the SAC) upon the judiciary (i.e. the court). The particular amendment is upheld by the courts which is traceable in a few recent cases of Islamic banking.[18] Recently, the Federal Court had, in *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President of Association Of Islamic Banking Institutions Malaysia & Anor*[19] held that 'Parliament is competent to vest the function of the ascertainment of Islamic law in respect of Islamic banking in the SAC and such ascertainment is binding on the court.' It was further stated that 'the SAC is the Legislature's machinery to assist in resolving disputes in Islamic banking. It does not exercise judicial power at all. Therefore, it is open to the Legislature to establish the SAC as part of regulatory statute and to vest it with power to ascertain Islamic law for the purpose of banking.'

Despite the critics and claims on the functions and roles of the judiciary, the body until now remains as a respected governing body in the country where citizens still reserve some level of trust and confidence in the system. Moreover, legal practitioners' representative body in the country, i.e. the Bar Council has as well kept the legal development in the country at an interesting pace as the different views and commentaries uttered have contributed to further progress of the laws.

16 See 'The Supervision of the Islamic Banks: An Analytical Analysis with Reference to Malaysia' by Adnan Trakic [2011] 1 SHLR lxxxii.

17 Central Bank of Malaysia Act 2009, s. 57.

18 For further reading, refer to The Shari'ah Advisory Council's Role in Resolving Islamic Banking Disputes in Malaysia: A Model to Follow?, by Tun Abdul Hamid Mohamad and Dr. Adnan Trakic, ISRA Research Paper (No. 47/2012) and Development of Islamic Finance and Islamic Law of Mu'amalat in the 21st Century by Tun Abdul Hamid Mohamad at http://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/download/ 739_00ed2e803e385b9845c82166d8d08f1b

19 [2019] 5 CLJ 569, FC.

21.2 THE MALAYSIAN JUDICIAL STRUCTURE

The civil court system in Malaysia consists of the superior courts and the subordinate courts. The superior courts comprise of the Federal Court, the Court of Appeal, and the High Courts of Malaya and of Sabah and Sarawak. The subordinate courts consist of the Sessions Court and the Magistrates' Courts.[20]

Before 2013, the Penghulu Court was one of the subordinate courts. However it has been abolished through an amendment to the Subordinate Courts Act 1948 which came into force on 1 March 2013.

21.2.1 Superior Court Judges

The highest rank of court in Malaysia is the Federal Court. It is headed by a Chief Justice who is also the head of Malaysian judiciary. The Court of Appeal is headed by President of the Court of Appeal, and the High Courts are headed by Chief Judge for both Malaya and, Sabah and Sarawak.[21]

Judges of the superior courts are not public servants as they fall under the exception of the service as provided under art. 132(3)(c) of the Federal Constitution. This also means that a superior court judge stands in similar position as the other posts mentioned in art. 132(3) of the Federal Constitution; which include ministers in Federal cabinet, State Executive Councils, members of Parliament and State Assemblymen.[22]

Not being a member of the public service means that the judge is independent in a way that he is not subjected to another 'superior' and that he remains as a member of the judicial and legal service committee; that his monthly remuneration is sourced from the Consolidated Fund

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20 See Malaysian Judicial Structure, viewed at http://www.kehakiman.gov.my/sites/default/files/document3/POJ-LAPORAN%20TAHUNAN/ENGLISH/IA-PT2.pdf

21 The four judges compose the Federal Court (art. 122(1) of the Federal Constitution).

22 See Malaysian Judicial Structure, viewed at http://www.kehakiman.gov.my/sites/default/files/document3/POJ-LAPORAN%20TAHUNAN/ENGLISH/IA-PT2.pdf

of the country (which is not subject to the yearly country's budget) and that his remuneration plus other terms of his office (including his pensions) shall not be altered to his disadvantage.[23] Furthermore, judges may serve until the age of 66 years old with a six months' extension subject to the consent of the Yang di-Pertuan Agong.[24] On top of that, the Legislative assembly of any state is prohibited from discussing the conduct of the superior court judges. The House of Parliament is allowed to do so, but subject to certain exceptions.[25]

The Chief Justice of Malaysia was previously known as the Lord President of the Supreme Court. Prior to 1994, there were significant changes in the Malaysian judiciary which mainly involved national issue of dismissal of a Lord President of the Supreme Court[26] and a few other judges of the same court on the ground of misconduct. This led to the 1988 constitutional crisis which then resulted in the amendment to art. 121(1) of the Federal Constitution which some said to be limiting the power of the judiciary. Another effect of the amendment is that it has replaced the Supreme Court with the Federal Court. Since 1963 to 1994, there were seven Lord Presidents of the defunct Federal Court and Supreme Court,[27] and eight Chief Justices (1994 to date). Currently, the judiciary is headed by the Right Honorable Tan Sri Dato' Seri Utama Tengku Maimun binti Tuan Mat who has been holding the position since May 2019.

23 Federal Constitution, art. 125(7).

24 See speech 'Judicial Independence, Accountability, Integrity and Competence - Some Aspects of the Malaysian Position' by 'Tun Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, presented during the International Conference and Showcase on Judicial Reforms (2005), viewed at http:// jrn21.judiciary.gov.ph/forum_icsjr/ ICSJR_ Malaysia%20 (D.%20Halim).pdf

25 Article 127 of Federal Constitution states 'the conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

26 For further reading, see http://en.wikipedia.org/wiki/Salleh_Abas

27 For further reading, see http://en.wikipedia.org/wiki/Lord_President_of_the_ Federal_ Court

It is worthwhile to note the case of *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-Peguam Muslim Malaysia*.[28] In this case, the applicant filed an application in the High Court to challenge the constitutionality of the appointments of the second and third respondents, Tan Sri Dato' Seri Md Raus bin Sharif and Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin, as the Chief Justice of Malaysia and President of the Court of Appeal, respectively, after their mandatory retirement. A constitutional question was referred to the Federal Court pursuant to s. 84 of the Courts of Judicature Act 1964, as to whether the appointments of the second and third respondents, as above were valid and constitutional. Subsequent to the 2018 General Election, the second and third respondents issued their letters of resignation and the same were consented by the Yang di-Pertuan Agong.

In dismissing the reference, the Federal Court stated:

> 'In view of the fundamental changes in the governance of the Judiciary with the departure of the second and third respondents, the stark issues as housed in the questions posed have now become blunted by consequential events.
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> It bears repeating that the illegality alleged has been superseded by subsequent events. As such, the subject matter of the dispute - the constitutionality of the judges holding their respective offices (second and third respondent) is no longer in existence. Their replacements have been made. What then is the dispute that needs to be resolved?
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> The outcome of the constitutional reference will not affect the positions of the parties at all. No order can be made to give effect to the issue. In other words, there is now no remedy that this court can order, to give effect to the applicant view on the constitutionality of the appointments.'

28 [2018] 10 CLJ 129, FC.

Judicial Appointments Commission Act 2009

Appointment of the superior court judges is by the Yang di-Pertuan Agong acting on the advice of the Prime Minister or by the Chief Justice, after consultation with the Conference of Rulers.[29] In 2009, the Judicial Appointment Commission was set up under the Judicial Appointments Commission Act 2009 (the 2009 Act) mainly to assist the Prime Minister when advising the Yang di-Pertuan Agong regarding the appointment of superior court judges. The Commission is empowered to do such other things as it deems fit to perform its functions effectively or which are incidental to the performance of its functions.[30] The Judicial Appointment Commission comprises the Chief Justice as the chairman of the Commission, President of the Court of Appeal, Chief Judges of the two High Courts, a Federal Court Judge to be appointed by the Prime Minister and four eminent persons[31] who are not members of the executive or the public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, Sabah

29 The appointment of the Chief Justice is by the Yang di-Pertuan Agong acting on the advice by the Prime Minister (Federal Constitution, art. 122B(1)). For the appointment of President of the Court of Appeal, the Prime Minister shall consult the Chief Justice before tendering his advice to the Yang di-Pertuan Agong (Federal Constitution, art. 122B(2)). For the appointment of a Chief Judge of High Court of Malaya, the Prime Minister shall consult the Chief Judges of each States; whereas for High Court of Sabah and Sarawak, the Prime Minister shall consult the Chief Minister of each of the States of Sabah and Sarawak (Federal Constitution, art. 122B(3)). For the appointment of judges other than the Chief Justice, President of Court of Appeal and Chief Judges: the Prime Minister shall consult Chief Justice for appointment of judges of Federal Court, the President of Court of Appeal for judges of Court of Appeal and Chief Judges of High Court for appointment of judges of High Court (Federal Constitution, art. 122B (4)).

30 Judicial Appointments Commission Act 2009, s. 21.

31 Currently, the four 'eminent persons' are three former Court of Appeal judges (Datuk Mah Weng Kwai, Datuk Linton Albert and Datuk Seri Mohd Hishamudin Yunus), and constitutional law expert (Emeritus Professor Datuk Dr Shad Saleem Faruqi). See https://www.thestar.com.my/news/nation/2018/09/18/four-new-appointees-to-judicial-commission/

Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.[32] Section 11 of the 2009 Act stresses on the need to disclose any relationship of the members of Commission whether 'related' or 'connected'[33] with the candidate to be appointed; this is to avoid any possible bias or unfairness in the process.

A superior court judge cannot be removed from his position unless the Prime Minister or Chief Justice after consulting the Prime Minister represents to the Yang di-Pertuan Agong that he should be removed due to breach of code of ethics[34] or due to inability, from infirmity of body or mind or other cause.[35] The representation will be referred to a tribunal whose members are appointed by the Yang di-Pertuan Agong and that he may be removed from his office based on the recommendation of such tribunal.[36]

Article 123 of Federal Constitution elaborates on the qualifications of judges to be appointed under art. 122B of Federal Constitution. The candidate must be a Malaysian citizen and must have served for at least ten years before his appointment. It may be worth referring to the Federal Court's decision in *Badan Peguam Malaysia v. Kerajaan Malaysia*.[37] In the above case, the issue before the Federal Court was on the appointment of Dr. Badariah binti Sahamid as a Judicial Commissioner of the High Court of Malaya who had less than 10 years in active practice as an advocate and solicitor. The majority decision held that her appointment as Judicial Commissioner was constitutional. The Federal Court's decision in *All Malayan Estates Staff Union v. Rajasegaran & Ors*,[38] was distinguished on the basis that

32 Judicial Appointments Commission Act 2009, s. 5.

33 *Ibid*, s. 11(3).

34 Federal Constitution, art. 125(3B).

35 *Ibid*, art. 125(3).

36 *Ibid*, art. 125(4).

37 [2008] 1 CLJ 521.

38 [2006] 4 CLJ 195.

the Federal Court in *Rajasegaran* considered and construed the words "advocate and solicitor" in the context of the Industrial Relations Act 1967 an ordinary Act of Parliament whereas in the present case, it was a construction of the Federal Constitution, art. 123.

In *Rajasegaran*'s case, the appointment of first respondent as Chairman of the Industrial Court pursuant to s. 23A(1) of the Industrial Relations Act 1967 was nullified because the first respondent was only in active practice for four years nine months and 22 days instead of the requisite seven years standing in practice as an advocate and solicitor. Augustine Paul FCJ delivering the judgment of the court in *Rajasegaran*'s case stated that a person who is entitled to practise as an advocate and solicitor under the Legal Profession Act 1976 is one with a valid practising certificate. His Lordship further stated that the word "advocate and solicitor" under s. 23A(1) has to be construed as a reference to an advocate and solicitor who has been in practice under the Legal Profession Act 1976. Further, the seven-year period in s. 23A(1) is closely connected to the qualification of a person as an advocate and solicitor and therefore, due weight ought to be given to these words in order to determine its purpose rather than brushing it aside as a mere addition.

Reverting back to *Badan Peguam Malaysia v. Kerajaan Malaysia*, the minority decision by Abdul Hamid Mohamad CJ stated: "The requirement that a person must be an advocate for at least ten years is meant to cover advocates and solicitors who practise law. It is not meant to include people who are "only in name" an advocate and solicitor merely by virtue of being admitted to the bar but spend their lives doing something else, whether teaching law, in business or politics. If they are intended to be included, the Constitution would and should have said so, as in Singapore or, more clearly in India which provides that a "distinguished jurist" is also qualified to be appointed a judge".

In following the earlier decision of the Federal Court in *Rajasegaran*'s case, Abdul Hamid Mohamad CJ further stated: "I am unable to find any fault in that judgment to justify me to disagree with it. I am unable to find any justification to depart from it. On the other hand, to hold otherwise would lead to an absurd result in which, a non-practising advocate may not be appointed a Chairman of the Industrial Court but

may be appointed a Judicial Commissioner, a judge of the High Court, a judge of the Court of Appeal, a judge of the Federal Court or even the Chief Justice. He does not have to practise law even for a day. All he has to do is to get admitted to the Bar, then may be go into business and/or into politics and after ten years he is qualified to be appointed even as a Chief Justice. That is the implication if this court were to rule otherwise"[39]

Apart from the above, s. 23(2) of the 2009 Act explains further the other criteria of a candidate to be selected which includes:

(a) competency, integrity and experience;

(b) objective, fair, impartial and good moral character;

(c) decisiveness, ability to make timely judgments and good legal writing skills;

(d) industriousness and ability to manage cases well; and

(e) physical and mental health.

Furthermore, a judge or judicial commissioner who has three or more pending judgments or unwritten grounds of judgments overdue for more than 60 days must not be selected.[40]

A candidate who may provide diversity in the fields of legal expertise and judicial knowledge will have greater chance to be selected by the Commission.[41]

The 2009 Act is seen to have establied a more standardised and systematic process of selecting superior court judges; however it is also seen as another 'encroachment' of the executive into the judiciary as it empowers the Prime Minister to select or remove members of the Commission and to decide on their allowances. The Prime Minister may or may not accept the recommendation by the Commission in that

39 At pp. 543-544.

40 Judicial Appointments Commission Act 2009, s. 23(3).

41 *Ibid*, s. 23(4).

if he is unsatisfied with the recommendation of the Commission, he may request for further names to be recommended and the Commission shall adhere to that request.[42] However, the stipulated requirements as to procedures and related qualifications of the members of the Commission need to be adhered strictly in order to ensure the quality and good reputation of those entrusted with the management of the judiciary.

21.2.2 The Subordinate Court Judge

Unlike the superior court judges, the subordinate court judges are members of the public service under the category of judicial and legal service.[43] In other words, their position is not as independent and secured as that of the superior court judges as they are subjected to superiors due to hierarchical nature in the public service. They are the members of the judicial and legal service. Thus, they do not retain their post as subordinate court judges; as there is a possibility that they might be posted for a different posts under the Attorney General Chambers, if they so requested.

Being a body which is always subjected to critics, the post was once criticised on its impartiality especially in the conduct of criminal proceedings.[44] This is due to the position of the Attorney General who was said to head the judicial and legal service who supervises the subordinate court judges. At the same time, he being the Attorney General possesses the control over conduct of prosecution on criminal cases. Thus, there is a concern that was raised in a case that the situation might lead to biasness in the conduct of the judges. The issue

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42 *Ibid*, s. 24.

43 Article 132(1)(b) of Federal Constitution.

44 The issue was raised and explained in a speech by the then Chief Justice of Malaysia, Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim during the International Conference and Showcase on Judicial Reforms held at the Shangri-La Hotel, Makati City, Philippines on 28-30 November 2005, viewed at http://jrn21.judiciary.gov.ph/forum_icsjr/ ICSJR_Malaysia%20(D.%20Halim).pdf

was clarified in *Maleb Su v. Public Prosecutor*[45] that the authority over judicial officers is the Judicial and Legal Service Commission and that the Attorney General acting as the head of the judicial and legal service was never mentioned in any law in Malaysia. It was further stated that the Attorney General cannot be the head of Judicial and Legal Service by virtue of art. 138 of the Constitution. Thus, that ensures the impartiality of the subordinate court judges. Nevertheless, it was suggested[46] that the subordinate court judges should as well be separated from the public service and that their position should be independent similar to that of the superior court judges; for a reason of establishing a more impartial judiciary as a whole in the country. However, up to this date, the subordinate court judges remain in the public service.

Appointment of Subordinate Court Judges

The subordinate court judges comprise the Sessions Court judges and the Magistrates. The appointment of both is governed by the Subordinate Courts Act 1948 (the 1948 Act).

Section 59 of the 1948 Act provides for the constitution of the Sessions Court. The constitution of the Magistrates' Court is governed by s. 76 of the same Act. A Sessions Court judge is appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge. 'No person shall be appointed to be a Sessions Court Judge unless he is a member of the Judicial and Legal Service of the Federation.'[47] Whereas, Magistrates are divided into two classes: First Class Magistrate and

45 [1984] 1 CLJ 378.

46 It was suggested by Tun Dato' Ahmad Fairuz in his speech 'Judicial Independence, accountability, integrity and competence – some aspects of the Malaysian Position' presented during the International Conference and Showcase on Judicial Reforms (2005). Viewed at http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_ Malaysia%20 (D.% 20 Halim).pdf

47 Section 60 of the Subordinate Courts Act 1948.

Second Class Magistrate. The appointment of First Class Magistrate is by the State Authority[48] on recommendation by the Chief Judge.[49] The appointment of the second class Magistrate is by the State Authority[50] without any requirement of recommendation.

21.3 JURISDICTION OF MALAYSIAN COURTS

There are two types of trials before the courts; civil and criminal. As discussed above, the courts are divided into two: superior courts and subordinate courts. Superior courts are composed of the two High Courts, Court of Appeal and the Federal Court. The jurisdictions of these courts are briefly provided in the Federal Constitution and the elaboration is provided in the Courts of Judicature Act 1964; whereas, the subordinate courts consist of the first class and second class Magistrates' Court and the Sessions Courts. The jurisdictions of these courts are provided by the Subordinate Court Act 1948. The types of jurisdiction include original, appellate, referral, and advisory; these jurisdictions are applicable in trying and deciding both civil and criminal cases.[51] The following discussion briefly elaborates the civil and criminal jurisdiction and powers of the abovementioned courts.

48 For Federal Territories, appointment of first class magistrate is by the Yang di-Pertuan Agong on the recommendation by the Chief Judge.

49 Subordinate Courts Act 1948, s. 78.

50 *Ibid*, s. 79; in Federal Territories, appointment is by the Yang di-Pertuan Agong.

51 The term 'jurisdiction' according to Black Law Dictionary is the power and authority constitutionally conferred upon a court or a judge to pronounce sentence of the law, or to award the remedies provided by the law. Original jurisdiction denotes the jurisdiction that a court has to hear and try cases at first instance before any other court in the hierarchy. For example, the jurisdiction of the High Court to try murder cases at first instance. Appellate jurisdiction means jurisdiction of a court to hear and decide on appeal cases decided by another lower court. Referral jurisdiction means the power of a court to determine constitutional issue which was raised in a case before another court of lower hierarchy; once the issue is decided, the case will be remitted back to the original court to dispose the issue according to the determination. Advisory jurisdiction is a constitutional function of a court to give opinion regarding the effect of provision when it is referred to it by the Yang di-Pertuan Agong. For further reading, refer to http:// www.aseanlawassociation.org/papers/Malaysia_chp2.pdf

21.3.1 The Superior Courts

The Federal Court

Article 121(2) of the Federal Constitution states the jurisdictions of the Federal Court with further reference to arts. 128 and 130 of the Federal Constitution. Basically, there are four types of jurisdiction of the Federal Court:

(a) original jurisdiction under art. 128(1). This article states that the original jurisdiction of the court includes firstly to determine whether a law made by the Parliament or by the Legislature of a State is invalid when both have no power to make laws and secondly any other disputes between States or between the Federation and any States;

(b) referral jurisdiction under art. 128(2). This article describes the referral jurisdiction of the court where it includes any question arises regarding the effect of any provision of the Federal Constitution;

(c) appellate jurisdiction under art. 128(3). This article further explains the appellate jurisdiction of the court, where it determines appeals from the Court of Appeal; and

(d) advisory jurisdiction under art. 130 of the Federal Constitution. Under this article, the Yang di-Pertuan Agong may refer to the court for its opinion on the issues relating to the effect of the Federal Constitution.

Part IV of the Courts of Judicature Act 1964 (the 1964 Act) categorises the jurisdictions of the Federal Court into three categories, which include original jurisdiction (s. 81), appellate jurisdiction on criminal appeals (ss. 86 and 87) and appellate jurisdiction on civil appeals (s. 96).

The Court of Appeal

Article 121(1B) of the Federal Constitution describes the jurisdictions of the Court of Appeal. The jurisdictions of the Court of Appeal include appellate jurisdiction to determine civil and criminal appeals from a High Court exercising its original, appellate or revisionary jurisdictions.

Section 50 of the 1964 Act prescribes that appellate jurisdiction of the court includes deciding criminal appeals which were decided by the High Court: (a) in the exercise of its original jurisdiction; and (b) in the exercise of its appellate or revisionary jurisdiction on criminal cases decided by the Sessions Court. Subsection (2) limits the appellate jurisdiction of the Court of Appeal for criminal cases decided by the Magistrates' to only decide on issues relating to question of law which have arisen in the course of appeal.

Section 67 of the 1964 Act describes the jurisdiction of the court to hear civil appeals that have been decided by the High Court when exercising its original or appellate jurisdictions.

Section 68(1) of the 1964 Act states that no appeal shall be brought to the Court of Appeal when:

(a) the amount claimed is less than RM250,000, except with the leave obtained from the Court of Appeal;

(b) the judgment or order from the court below was made by consent of the parties;

(c) the judgment or order relates to cost only which by law is left to the discretion of the court, except with the leave of the Court Appeal;

(d) the judgment or order by the High Court is final, according to the law for the time being in force.

Section 68(3) of the 1964 Act further states that no appeal shall be brought from a decision of a Judge in Chambers in a summary way on interpleader summons where the facts are not disputed, except with the leave of the Court of Appeal. However, an appeal is allowed on judgment made by the court in a trial on an interpleader issue.

The High Court

The High Court's jurisdictions are as follows: original, appellate supervisory and revisionary. Basically, the original jurisdiction of the High Court includes jurisdiction to hear criminal and civil cases. The original jurisdiction of the High Court is unlimited in the sense that it may award a maximum sentence in criminal cases and in civil cases it may decide on matters where the claim exceeds RM1,000,000.

Section 22 of the 1964 Act describes the criminal jurisdiction of the High Court to include offences committed (a) within its local jurisdiction, (b) on the high seas on board of a ship or on an aircraft registered in Malaysia, (c) by a citizen or a permanent resident of Malaysia on a ship or on an aircraft, (d) by any person on the high seas where the offence is a piracy by the law of nations.

The civil jurisdiction of the High Court is divided into two, namely, general and specific jurisdiction. Section 23 of the 1964 Act delineates the general jurisdiction of the High Court to include civil cases where (a) the cause of action arose, (b) the defendant resides or having his place of business, (c) the facts on which the proceedings are based exist or alleged to have occurred, (d) the land in dispute as to its ownership is situated. Section 24 of the 1964 Act allocates the specific jurisdiction of the High Court to include (a) jurisdiction in divorce and matrimonial cases, (b) jurisdiction in matters of admiralty which is similar to the jurisdiction of the High Court of Justice in England as stated in the United Kingdom Supreme Court Act 1981, (c) jurisdiction relating to bankruptcy or to companies, (d) jurisdiction to appoint and control guardians for infants as to the person and to the property, (e) jurisdiction to appoint and control guardians to idiots, mentally disordered persons and persons of unsound mind, (f) jurisdiction to grant probate of wills and testaments, and letters of administration of the estates of deceased for property situated within the High Court's territorial jurisdiction.

The appellate jurisdiction of the High Court also includes jurisdiction to hear criminal and civil appeals. Section 26 of the 1964 Act states the jurisdiction of the High Court to hear criminal appeals from the

subordinate courts within its territorial jurisdiction. Whereas for civil appeal, s. 28(1) of the 1964 Act prescribes that the High Court in general shall not hear civil appeal from the subordinate courts which amount is RM10,000 or less except on the question of law. However, on matters relating to maintenance of wives or children, the High Court shall hear such appeals from the subordinate courts regardless the amount involved.[52]

In any proceedings in the subordinate court, matters regarding the effect of any provision of the Constitution must be referred to the High Court.[53] For that, the High Court may order the records of the particular proceedings to be submitted to them for the purpose of examination and decision and that it shall be carried out in accordance with s. 84 of the 1964 Act.[54] The decision on the particular issue will be deemed as rules of court for the purposes of art. 128(2) of the Federal Constitution.[55] However, the High Court in discharging this function is acting within its original jurisdiction.[56]

The High Court also has general revisionary and supervisory jurisdiction over all the subordinate courts, where in the interest of justice whether through its own motion, or at the instance of interested party or person, shall call for the record of particular case, whether of criminal or civil at any stage of proceeding, to be removed into the High Court or shall give further directions to the subordinate courts as it thinks necessary in the interest of justice and that the case shall be stayed awaiting disposal by the High Court.[57]

52 Courts of Judicature Act 1964, s. 28(2).

53 *Ibid*, s. 30(1).

54 *Ibid*, s. 30(2).

55 *Ibid*, s. 30(3).

56 Compared to the role of the Federal Court, where discharging of the same function under art. 128(2) of the Federal Constitution would be within its referral jurisdiction.

57 Courts of Judicature Act 1964, s. 35.

21.3.2 The Subordinate Courts

The subordinate courts are established under s. 3 of the Subordinate Courts Act 1948 (the 1948 Act). The subordinate court comprises Sessions Courts and Magistrates' Courts. The 1948 Act has undergone stages of amendments as to the jurisdiction and composition. For example, amendment in 2010 enhanced the jurisdiction of the subordinate courts to certain extent which will be discussed in the following paragraphs, while in 2013, the composition of the courts was reduced through the abolishment of the constitution of the Penghulu Court.[58]

The Sessions Court

The Sessions Court is on top of the list in the hierarchy of subordinate courts. The jurisdiction of the Sessions Court includes its original jurisdiction to hear and try criminal and civil cases. Section 63 of the 1948 Act confers criminal jurisdiction to the Sessions Court to try all offences except offences punishable with death. Section 65 of the 1948 Act elaborates on the civil jurisdiction of the Sessions Court. It includes:

(a) unlimited jurisdiction to try all actions and suits of motor vehicle accidents, landlords and tenants, and distress,

(b) monetary jurisdiction in all actions and suits of civil nature up to RM1,000,000,[59]

(c) unlimited jurisdiction to try all actions and suits for the specific performance or rescission of contracts or for cancellation or rectification of instruments,[60]

(d) unlimited jurisdiction to grant an injunction or make a declaration in any action or suit, whether or not any other relief, redress or remedy is or could be claimed.[61]

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58 Subordinate Courts (Amendment) Act 2010 (Act A1382), ss. 2, 3(b), 4(b), 5(c), 10, 12 and 15.

59 Subordinate Courts (Amendment) Act 2010 (Act A1382), s. 7(a)(ii). Previously, the monetary limit was only up to RM250,000.

60 Subordinate Courts (Amendment) Act 2010 (Act A1382), s. 7(a)(iii).

61 Subordinate Courts (Amendment) Act 2010 (Act A1382), s. 7(b).

However, the jurisdiction of the Sessions Court is also subjected to certain exceptions. The Sessions Court does not have jurisdiction in actions, suits or proceedings:

(a) relating to immovable property,

(b) to enforce trusts,

(c) for accounts,

(d) for declaratory decrees,

(e) for the issue or revocation of grants of representation of the estates of deceased persons or the administration or distribution thereof,

(e) to determine legitimacy of any person,

(f) where guardianship or custody of an infant is in question, and

(g) to determine issue of validity or dissolution of any marriage.

The Magistrates' Court

The Magistrates are divided into two categories: (a) First Class Magistrate and (b) Second Class Magistrate. In general, the First Class Magistrate has greater power than the Second Class Magistrate.

Section 85 of the 1948 Act explains that the criminal jurisdiction of a First Class Magistrate includes jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under ss. 392 and 457 of the Penal Code. The criminal power of this court is contained in s. 87 namely, that this court may pass any sentence allowed by law not exceeding - (a) five years imprisonment, (b) a fine of RM10,000, (c) whipping of up to 12 strokes, or (d) combination of sentence of imprisonment, fine or whipping. Section 88 of the 1948 Act provides that the Second Class Magistrate shall only have jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed twelve months'

imprisonment of either description or which are punishable with fine only. Meanwhile s. 89 describes the criminal jurisdiction of a Second Class Magistrate, which includes: (a) imprisonment of a term not exceeding six months, (b) a fine not more than RM1000, or (c) combination of sentences of imprisonment and fine.

For civil jurisdiction, s. 90 of the 1948 Act prescribes that a First Class Magistrate has the jurisdiction to try all actions and suits of civil nature where the monetary value does not exceed RM100,000.[62] Whereas, a Second Class Magistrate has the jurisdiction to try original actions or suits by a plaintiff to recover debts or liquidated demand from a defendant for an amount not exceeding RM10,000.[63]

21.4 ETHICS OF JUDGES

Justice which is the ultimate aim of any proceeding may only be realised through efficient, just and impartial judiciary. The public confidence in the integrity and quality of the judiciary must be maintained at all time. The judiciary must not only be independent but must also be seen to be independent. It is widely observed that justice should not only be done but manifestly and undoubtedly be seen to be done. As representative of the judiciary, judges perform their constitutional function with integrity and independence.

The conduct of judges should be beyond reproach. He should keep away from situations that can prevent him from discharging justice and should avoid all appearance of bias, this would necessarily include declining to adjudicate a case where he is a party or has personal interest in the case. In *Public Prosecutor v. Goh Chooi Guan*,[64] Syed Agil Barakbah J stated that: 'A man is disqualified from sitting in a judicial

62 Subordinate Courts (Amendment) Act 2010 (Act A1382), s. 11. Previously before the amendment, the monetary value was set at only RM25,000.

63 Subordinate Courts (Amendment) Act 2010 (Act A1382), s. 13. Previously before the amendment, the limit was set at only RM3000.

64 [1978] 2 MLJ 169.

capacity on ground of bias in favour of one side or the other, or of prejudice against one side or of contravention of the rules of natural justice. There need not be actual bias or prejudice, but it is sufficient if in the eyes of right-minded person there is such likelihood, in the circumstances, even though he is impartial as can be.' In delivering the opening address at the 14th Malaysian Law Conference in 2007, the late Sultan Azlan Shah said: 'I wish to state with all fortitude that without a reputable judiciary – a judiciary endowed and equipped with all the attributes of real independence – there cannot be the rule of law.'

In *AM Mathur v. Pramod Kumar Gupta & Ors*,[65] the Supreme Court of India stated: "The judge's bench is a seat of power. Not only do judges have power to make binding decisions, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. But they cannot misuse their authority by intemperate comments, undignified banter of scathing criticism of counsel, parties or witnesses. We concede that the court had the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct".

In *Insas Bhd v. Ayer Molek Rubber Co Bhd*,[66] it was stated: "they [judges] should refrain from criticising another court, their brother judges and lawyers who have no opportunity to correct such injustice caused to them which will have detrimental effect on their characters and professional careers especially in cases like this where there is no evidence or cause to warrant their criticism, and where the judges of the Court of Appeal have no jurisdiction to hear an oral application when the motion for stay had been withdrawn. They must remember

65 [1990] 2 SCC 533, 538-539.

66 [1995] 3 CLJ 328, 342.

that they are themselves not infallible and should not use the Bench as a forum to pass harsh and disparaging strictures on others. Such conduct may be seen as being malicious, mischievous and irresponsible, and will bring the administration of justice into disrepute. Judges and Magistrates must not only act neutral and fair but be seen to act so. They should not jump into the arena and do battle with the parties lest they may be blinded by the dust of the battle".

In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)*,[67] Richard Malanjum CJ (Sabah & Sarawak) stated: "a judge must accept that the freedom attached to his adjudicative independence imposes concurrent responsibility to address only those issues properly before him, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before him. Independence means that in the discharge of his function a judge is subject to nothing but the law and the command of his conscience. This aspect of the concept of judicial independence refers to the neutrality of mind of the judge, to his impartiality and his total freedom from irrelevant pressures. The goal of judicial independence is to ensure justice is done in individual cases and to ensure public confidence in the justice system".

Hence, judges, whether of superior or subordinate courts, are subjected to certain code of ethics. Over the years, the issues that relate to the ethics of judges and their misconduct are relevantly minimal in occurrence but it is a hot topic and has been one of the central subjects for debate for some countries.[68] In fact, Malaysians have witnessed some incidents relating to the issue. In 2007 for example, the nation was alarmed by a video featuring the then Chief Justice, who discussed on the candidate who would hold the post of Chief Justice after him; or the issue which took place in 2011 when it was alleged that certain judges committed

67 [2007] 4 CLJ 725, 769-770.

68 Speech by Lord Clarke of Stone-cum-Ebony on 'Ethics and Civil Procedure Malaysian Judges' (14th September 2011). Viewed at http://www.kehakiman.gov.my/download/file/ fid/1579

plagiarism in delivering judgments.[69] More recently, is the allegations by sitting Court of Appeal judge Datuk Dr Hamid Sultan Abu Backer in his 65-page affidavit filed in support of an application by lawyer Sangeet Kaur Deo exposed alleged misconduct, bias and facilitating channelling of public funds by some judges, retired and serving.

Thus, it is certainly not an issue to be neglected because the effect of misconduct is severe and is a torment to the nation as it could cause the public to lose confidence over a group of officials who are formally trusted to adjudicate their disputes.

In Malaysia, the Judges' Code of Ethics 1994 (the 1994 Code) was first passed bearing the aim of enhancing control over the ethics of judges while discharging their duties. The 1994 Code was passed by virtue of power conferred by art. 125(3A) of the Federal Constitution. Judges were to comply with the 1994 Code throughout their service.

In 2009, another Code was passed to revamp the 1994 Code. The new code is known as the Judges' Code of Ethics 2009 (the 2009 Code) and it came into force on 1 July 2009. The 2009 Code intends to set a standard to govern a judge's conduct for the purpose of maintaining the high standards of personal and judicial conduct.[70] The 2009 Code shall apply to judges throughout their service. Section 4 of the 2009 Code prescribes the duty of judges to adhere and comply with the Code and that non-compliance will result in judges being subject to disciplinary proceedings under the Code.

In general, the 2009 Code stipulates that judges are expected to carry out their duty with integrity and ensure the independence of the judiciary. Section 5 of the 2009 Code states that the judicial function of a judge must be independently exercised based on the assessment of the

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69 For further reading, please refer to http://www.freemalaysiatoday.com/category/nation/ 2011/10/20/bar-probe-possible-judges-misconduct/ and http://www.malaysianbar.org.my/press_statements/proper_judicial_conduct_must_be_upheld_at_all_times.html

70 Judges' Code of Ethics 2009, s. 2.

facts and his understanding of the law; free from extraneous influence, inducement, pressure, threat or interference. Section 7 of the 2009 Code furthermore lists down eight guidelines that need to be adhered to by judges in order to perform their judicial duties fairly and efficiently. The guidelines include:

(1) the judicial duties of a judge shall take precedence over all his other activities;

(2) a judge shall not participate in the determination of a case which is represented by his family member or is associated to the case in any manner;

(3) a judge shall perform his judicial duties without bias or prejudice;

(4) a judge shall perform his judicial duties fairly, efficiently, diligently and promptly;

(5) a judge shall prevent himself from giving any general comment about a pending proceeding or a proceeding that will be soon disposed of possibly in his court in such a way that could imply to reasonable person what the nature of the outcome of the case will be;

(6) a judge shall not disclose or use any classified information obtained in his judicial capacity for any unrelated purpose to his judicial duties;

(7) a judge shall endeavor diligently and efficiently in hearing and disposing of cases in his court and shall immediately write his judgment;

(8) a judge shall not conduct in an inappropriate manner which could or may disrepute himself as a judge.

Other than that, the 2009 Code also regulates judges' conduct by giving guidelines on how they should conduct themselves in extra judicial activities.[71] Part IV of the 2009 Code deals extensively with

71 *Ibid*, s. 8.

related procedures when there is breach of the Code. Part V explains the sanctions which may be imposed on judges if they are found guilty of breaching the Code. This includes (a) record of admonition to the judge and (b) suspension from his office for a period of not more than a year.[72] The 2009 Code ensures that judges who deliberately breach their responsibility will be dealt with administratively.

It must be added that due to the nature of their job, judges face increased public scrutiny. In a free society, a person is entitled to criticise the conduct of the courts or of a judge without the risk of criminal prosecution. Hence, the integrity and independence of a judge is required not only when conducting trials and during sentencing but even outside the courtroom in his daily pursuits. It is undesirable for judges to bring themselves within the focus of public criticism such as involvement in issues which are or might become politically controversial. The recent video at the opening of the Legal Year 2019 in Kota Kinabalu showing the top judge doing the 'twist' with the Attorney-General, *de facto* Law Minister and private lawyers had created a negative public perception about the separation of powers between the judiciary, the Attorney-General, and the executive. The public perceived that the separation of powers has been compromised and their opinion ought not to be relegated as this reflects the measure of public confidence in the integrity of the judiciary. As stated earlier, the Code provides, *inter alia*, that a judge shall not conduct himself in a manner which is not befitting of a judge or which brings or is calculated to bring disrepute to his office as a judge. Further, he must ensure that his extra-judicial activities do not cast reasonable doubt on his capacity to act impartially as a judge or interfere with the proper performance of his judicial duties.

72 It is however interesting to note that previously, in the 1994 Code it was stated that breach of any provision would constitute a ground for removal of a judge from office.

What happens if a litigant wishes to highlight the concern of misconduct of a judge who presides over his case? Until now the option is for the litigant to apply that the judge recuses himself from the case. There are a few cases where such application was brought on the ground that the judge might be bias against the applicant. However, such application is seen to be a very risky action by the litigant, because the situation might work in a different way if the judge is instead found to be just and acting appropriately. In such cases, the applicant might be cited for contempt. Hamid Sultan Abu Backer J stated in his judgment:

> I must say here the 'real danger of bias' test imposes a high threshold for the applicant to satisfy ... On my part, I will say that: (i) it would be a gross dereliction of duty for a judge to disqualify himself when there is no real danger of bias in hearing the case; (ii) when the application for recusal was made with no appropriate grounds or prospect of success such an application must be treated as an attempt to interfere with the administration of justice; (iii) in such instance, where appropriate, once the suit had been disposed of the court should proceed to issue show cause letter against the relevant person or persons who attempted to place the administration of justice to disrepute; and (iv) failure of the judge or the judiciary to protect the administration of justice will ... also stand as dereliction of duty and omission to act pursuant to article 126 of the Federal Constitution.[73]

In the circumstances, the application was held to be mischievous and an abuse of process of the court.

73 *Comsa Farms Bhd v. Malaysian Assurance Alliance Bhd* [2012] 3 CLJ 724. For further reading, refer to *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* [2002] 4 CLJ 309, FC.

Judicial Immunity

Judges of the civil courts[74] and deputy registrars of these courts[75] are accorded statutory immunity or protection of the law against all or any act done or ordered to be done by them in the discharge of their judicial duty, whether or not within the limits of their jurisdiction, nor shall any order for costs be made against them, provided that they at the time in good faith believed that they have jurisdiction to do or order the act complained of. The above judicial immunity from civil proceedings for act done or words spoken in the exercise of his judicial office is accorded to the superior civil courts pursuant to s. 14(1) of the Courts of Judicature Act 1964. Subsection 2 and 3 of s. 14 extended the protection to officer of any court or other person bound to execute the lawful warrants or orders of any judge and this includes sheriff, bailiff or other officer of the court charged with the duty of executing any judgment, order or warrant of distress, or of attaching any property before judgment.

The protection is primarily to ensure that the judge should be able to discharge their judicial functions with complete independence and without any external interference. "[The]… basis for judicial immunity is rooted in the need to protect the public but not a need to protect judges. Amongst the most important tribute that judges owe to the public are objectivity, independence and impartiality. Thus, any innovative legal argument invoked against these attributes must be carefully scrutinised. It must be so, in order to ensure the public that a presiding judge is discharging his duty without having to worry, or that

74 See *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651 (CA); [2005] 4 CLJ 925 (HC); *Hodan-R Sdn Bhd v. Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701; *Takang Timber Sdn Bhd v. The Government Of Sarawak & Anor* [1998] 3 CLJ SUPP 413. See also Prosecutorial immunity: a review of *Rosli Bin Dahlan v. Tan Sri Abdul Gani Bin Patail & Ors* [2015] 1 MLJ xcvii.

75 See *Law Hock Hua & Anor v. Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur & Anor* [2006] 4 CLJ 300 where it was held that the first defendant, i.e. the Deputy Registrar, was also protected by s. 14 of the CJA. See also Prosecutorial immunity: a review of *Rosli Dahlan v. Tan Sri Abdul Gani Bin Patail & Ors* [2015] 1MLJ xcvii.

his decision would not be based on a dispassionate appreciation of the facts and law related to the dispute. Otherwise, he may be affected by thoughts as to which party would pose a threat of litigation".[76]

The rational for providing judicial immunity had been lucidly illustrated by Lord Denning MR in *Sirros v. Moore & Ors*.[77] His Lordship stated:

> "Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for *habeas corpus*, or a writ of error or *certiorari*, or take some step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the Criminal Courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear".[78]

His Lordship added:

> "Every judge of the courts of this land – from the highest to the lowest – would be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn

76 Per Rohana Yusuf JC in *Law Hock Hua & Anor v. Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur & Anor* [2006] 4 CLJ 300.

77 [1975] QB 118 (Eng).

78 *Ibid*, at p 132.

> the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it".[79]

Again, in *Hodan-R Sdn Bhd v. Dato' Mohd Hishamudin Hj Mohd Yunus*,[80] Ramly Ali J stated:

> "The strength of this judicial immunity lies in the right of citizens to feel that when discharging his judicial duties a judge will have no more reason to be affected by fear than he will allow himself to be subjected to influences of favour. Thus, he is surrounded with an absolute immunity from civil proceedings for act done or words spoken in the exercise of his judicial office. But that immunity is in no sense a private right which might be regarded as having been conferred upon him which he then might be said to enjoy. He is merely the repository of public right which is designed to ensure the administration of justice will be untrammelled by the collateral attacks of disappointed or disaffected litigants. A judge can, of course, be made to answer, and in a proper case pay dearly, for any criminal misconduct. Like any other citizen criminal proceedings may be brought against him. If need arose steps may be taken in accordance with law to remove him from office. In that sense, a judge is not 100% immune. In other words, judicial immunity as discussed above not in any way confers a judge a status 'above the law'. It does not cover any act done by a judge in his personal capacity

79 *Ibid*, at p 136.

80 [2007] 2 CLJ 701, at pp 712-715. See also *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651.

> or done outside his official duties. If in the course of his official work he should fall into error, the matter can become the subject of appeal. If he should wrongly deprive a man of his freedom altogether, then, apart from appeal, there is the remedy of *habeas corpus*. But in relation to the performance of his judicial function the judge is immune from attack in civil proceedings ... it is clear that the ambit of judicial immunity is wide. It protects a judge from all civil liabilities for all judicial and administrative acts necessary for a judge to carry out his duties effectively, so long as the judge acts in good faith. This is so even if the judge had acted "under some gross error, or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness" or he is "shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act". The only exception to judicial immunity is if the judge has accepted bribes, or is corrupt, or has perverted the course of justice or has committed any criminal was conduct. In those circumstances, a judge may be liable to criminal prosecution and may even be removed from office, but he still cannot be liable in a civil action for damages".

The only exception to judicial immunity is if the judge has accepted bribes or is corrupt,or has perverted the course of justice or has committed any criminal conduct. In those circumstances, a judge may be liable to criminal prosecution and may even be removed from office upon the recommendation by a tribunal set up pursuant to the Constitution for judicial misconduct. In *Law Hock Hua & Anor v. Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur & Anor*,[81] Rohana Yusuf JC stated:

> "Immunity from civil action against a judicial authority under s. 14 simply means that even though one cannot sustain a civil action against a judicial authority other remedies nevertheless remain available to the party. As observed by Lord Denning MR in the Sirros case, the right of appeal to reverse the decision or order, and the right to quash

81 [2006] 4 CLJ 300.

> the decision by way of *certiorari* are some of the remedies. In fact his observations go even further to note that even when a criminal offence has been committed by a judicial authority, he can be subject to a criminal charge, but the liability in a civil action will not be an available action against him….the basis for judicial immunity is rooted in the need to protect the public but not a need to protect judges. Amongst the most important tribute that judges owe to the public are objectivity, independence and impartiality. Thus, any innovative legal argument invoked against these attributes must be carefully scrutinised. It must be so, in order to ensure the public that a presiding judge is discharging his duty without having to worry, or that his decision would not be based on a dispassionate appreciation of the facts and law related to the dispute. Otherwise, he may be affected by thoughts as to which party would pose a threat of litigation. As stated by Lord Denning in Sirros case (at p. 785) that so long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in fact or in law but so long as he honestly believes his action to be within his jurisdiction, he should not liable".

It would be worthwhile reproducing observation by Low Hop Bing JCA (as his Lordship then was) in *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor*,[82] where his Lordship had illuminated judicial immunity with reference to the law and practice in the selected common law jurisdictions as follows:

> "The doctrine of judicial immunity encompasses immunity at common law and under statute. Common Law jurisdictions have shown extensive recognition for this doctrine. By way of illustration, the Courts in England, Australia and New Zealand apply the common law doctrine of judicial immunity, while Malaysia, India and Canada express the doctrine of judicial immunity in statutory provisions.

82 [2008] 1 CLJ 651, 675–680 (CA).

Judicial Immunity At Common Law

In England, the Court of Appeal in the celebrated case of *Sirros v. Moore & Ors* [1975] QB 118 dismissed an appeal by a plaintiff in an action against a judge, arising from words spoken by the judge, the orders he gave and the sentences he imposed. The following principles may be culled therefrom:

(1) No action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him;

(2) No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitables, he is not liable to an action;

(3) The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for *habeas corpus*, or a writ of error or *certiorari*, or take some such step to reverse his ruling;

(4) If the judge has accepted bribes or has been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts;

(5) The reason for judicial immunity is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear;

(6) This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be;

(7) Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself, "If I do this, shall I be liable in damages?";

(8) If the act was, or purported to be, a judicial act and was within the judicial powers of the judge, he is immune from civil liability. Public policy requires that the judge's conduct should not be impugned; and

(9) Where a judge, though acting within his powers, is shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all, the remedy of his removal from office would be available, but in the public interest, his conduct should not be open to debate in a private action.

In Australia, the courts have shown a similar rationale and test for judicial immunity. In *Gallo v. Dawson* [1988] ALR 801, the High Court struck out a suit brought against a judge as he is not liable to be sued in respect of acts done in the performance of his judicial duties.

In *Moll v. Butler* [1985] 10 Fam LR 544 SCNSW, the Supreme Court of New South Wales was faced with an application to summarily terminate (similar to our O. 18 r. 19(1)) the action brought against a judge of the Family Court of Australia for committing the plaintiff to prison for contempt. The court struck out the action after finding that the judge had jurisdiction to make the orders in question and was immune from action, applying the principles enunciated in *Sirros, supra*.

In *Nakhla v. Mc Carthy* [1978] 1 NZLR 291, the New Zealand Court of Appeal held that absolute immunity is accorded to a judge from civil proceedings for acts done in the exercise of his judicial office. Such immunity is not as a private right but to ensure that in the public interest the administration of justice will be carried on without fear of the consequences, without hope or favour.

In *Harvey v. Derrick* [1995] 1 NZLR 314, the New Zealand Court of Appeal through Richardson J re-affirmed the rationale for judicial immunity in the following passage:

> A range of public interest considerations has been advanced by the court and commentators to justify judicial immunity. The primary grounds are that the public interest requires an independent judiciary free from the fear of vexatious personal actions, and judicial immunity is necessary to protect the free and independent exercise of judgment in the public interest; that it is crucial in a democracy that judges be perceived as fair and responsible and judicial immunity is necessary to preserve the dignity and respect of the judicial system as a whole; and that without a rule of judicial immunity it may become increasingly difficult to attract men and women of the highest character and ability to judicial office.

Statutory Judicial Immunity

In Canada, judges' judicial immunity is recognized and fully protected by the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms. In *Taylor v. Canada (Attorney General)* [2000] 3 FC 298, the Federal Court of Canada held, *inter alia*, that:

(1) The most important attributes, that judges owe to the public objectivity, independence and impartiality, must be protected; and any innovative legal principle that encroaches on these attributes must be carefully scrutinized; and

(2) It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely; without favour and without fear. This provision of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

In India s. 1 of the Judicial Officers Protection Act 1950, where relevant, reads:

> No Judge, ... or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

Section 1 was considered in *Anowar Hussain v. Ajoy Kumar* AIR [1965] SC 1651. The Supreme Court of India held as follows:

> If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no enquiry will be entertained whether the act done or ordered was erroneously, irregularly or even illegally, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. If the act done or ordered is not within the limits of his jurisdiction, the judicial officer acting in the discharge of his judicial duties is still protected, if at the time of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order the act. The expression jurisdiction does not mean the power to do or order the act impugned, but generally the authority of the judicial officer to act in the matter.

Within our shores, judicial immunity is enacted in s. 14(1) which reads:

> No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of.

In our view, the applicability of the doctrine of judicial immunity under s. 14(1) must be considered in the light of the facts and circumstances prevailing in each particular case, especially conduct which comes within the ambit of the expression "acting judicially".

Section 14(1) was considered in *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v. Tan Beng Sooi* [1997] 2 CLJ 409 CA. The relevant facts reveal that the registrar of the Johor Bahru High Court had issued a circular to licensed auctioneers. The circular provided for a fixed sum payable in cases of abortive auctions. Abdul Malek Ahmad JCA (later PCA) delivering judgment of the court held that the registrar was not acting judicially in issuing the circular, in which case s. 14(1) provides no protection and so the proceedings against the office of the registrar were held to be in good order.

On the other hand, in *Tai Choi Yu v. Ian Chin Hon Chong* [2002] 2 CLJ 259 HC, the defendant, judge of the High Court of Sabah and Sarawak, was sued by the plaintiff in respect of an alleged libel contained in the defendant's written judgment delivered in a civil suit in Miri High Court in the discharge of his judicial function as the trial judge. Sulaiman Daud JC (now JCA) invoked s. 14(1) and held that in view of the immunity conferred on a judge thereunder, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset.

In *Tee Yam v. Timbalan Menteri, Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2005] 6 CLJ 550 HC, Jeffrey Tan J had the occasion to consider an equipollent provision contained in s. 10 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("s. 10") which provides, *inter alia*, that every member of the advisory board shall have, in any action or suit brought against him for any act done or omitted to be done in the execution of his duty under the said Ordinance, the like protection and privileges as are by law given to a judge in the execution of his office. Upon a true construction of s. 14(1) and s. 10, the learned judge concluded that immunity is conferred on every member of the advisory board in the circumstances stated therein.

It has been alluded to above that the title to the plaintiff's action and para. 2 of the statement of claim against the first defendant show that the first defendant was sued in his capacity as a judge of High Court Malaya.

> From the facts in the instant appeal, it was clear that the first defendant was at the material time the judge heading the civil division of the Kuala Lumpur High Court in charge of, *inter alia*, all matters pertaining to execution and attachment process including writs of seizure and sale in the Kuala Lumpur area.
>
> In our judgment, judicial immunity conferred by s. 14(1) is wide enough to extend to the discharge of his duties under art. 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant are entirely within his authority and within the limits of his jurisdiction legally conferred upon him by art. 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner including the place from which he exercised that authority (phone call from Singapore while on leave) are irrelevant".

More recently, in *Messrs Tai Choi Yu & Co Advocates v. Arifin Zakaria & Anor*,[83] the appellant had sent several letters reminding the Court of Appeal judges for the written grounds of judgment for the case they head on appeal in the Suit No. MYY-22NCvC-15/7-2013. When he failed to receive the positive responds, the appellant sent a letter to the 1st respondent who was then the Chief Justice of Malaysia making a complaint for disciplinary proceedings against YA Zaharah bte Ibrahim and YA Tengku Maimun bte Tuan Mat under paragraphs 12 and 13 of the Judges' Code of Ethics 2009 for their refusal to "promptly" write and supply the grounds of judgment and for their failure to act "diligently and efficiently" as provided under paragraph 7(7) of the Judges' Code of Ethics 2009. Upon investigation into this matter, the 2nd respondent informed the appellant that there was no basis for the complaint. The appellant then filed an ex-parte application for leave for judicial review. The leave application was however dismissed by the High Court Judge and hence, this appeal to the Court of Appeal by the appellant against that decision.

83 [2019] 1 LNS 812.

In dismissing the appeal, the Court held, *inter alia*, the judicial immunity to judges in the discharge of their judicial duties which is conferred by s. 14 of the Act is extended to the respondents in this case. Stephen Chung Hian Guan JCA delivering the judgment of the Court stated: 'Reading the Code of Ethics, the Chief Justice has wide discretion to decide, after consulting the President of the Court of Appeal in this case, whether there is merit in the complaint or whether the judge is in breach of the Code and whether to refer the judge to a tribunal appointed under cl. (4) of art. 125 of the Constitution or may refer the matter to the Judges' Ethics Committee established under the Judges' Ethics Committee Act 2009. Therefore, there is nothing in the Code or the Constitution to make it mandatory or to compel the respondents to refer the two judges to the Committee or the tribunal for disciplinary actions to be taken.'

21.5 LEGAL PROFESSION IN MALAYSIA

Legal Profession in the Past[84]

The legal profession in Malaysia has long been established and from time to time it has well demonstrated its role in administering justice in the country by providing the public access to justice and legal assistance. A body which resembles the Malaysian Bar today was established as early as 1914 through the enforcement of the Advocates and Solicitors Ordinance 1914. The ordinance aimed to regulate legal practitioners in the Federated Malay States. It was later replaced by the Advocates and Solicitors Ordinance 1940. The legal practice in the Unfederated Malay States was regulated by different ordinances – Johor was regulated by the Advocates and Solicitors Enactment of Johor and the Strait Settlements were regulated by the Advocates and Solicitors Ordinance of the Straits Settlement. After the first world war however, all the ordinances and enactments were repealed and replaced by one ordinance, the Advocates and Solicitors Ordinance 1947.

84 Parts of this discussion are in reference to 'History of Malaysian Bar' by R R Chelvarajah (2006), viewed at http://www.malaysianbar.org.my/echoes_of_the_past/history_of_the_malaysian_bar_.html

Legal Profession at Present

Today, many transformations have taken place in the profession. The transformations are in the form of challenges which require lawyers to be steadfast, more disciplined and ethical in carrying out their responsibilities. Apart from that, cases nowadays are also getting more challenging with many procedures to comply with as a result of fruitful development of the laws in the country. All the changes and challenges that are facing the lawyers at present have forced them to be more equipped and to part from the 'traditional' and usual methods of doing their tasks. Recently, a move towards liberalisation of the profession was engaged through amendments to the Legal Profession Act 1976. The move is seen to be an effort to globalise the profession as it would encourage competitiveness among the lawyers, both local and foreign. According to the former Chief Justice of Malaysia, Tun Arifin Zakaria during the International Malaysia Law Conference 2014, globalisation is the main impetus in transforming the legal profession and lawyers have to be more externally-focused and attentive not just on the legal trends in Malaysia but also internationally.[85] The other challenges according to him are the evolving role and expectations of lawyers in a society, continuing legal education and the use of technology.[86] The changes will not be an easy matter to cope with; especially not the lawyers.

Thus the profession is no longer as easy as it was before. It is still a profession that provides the access to justice to aggrieved people and protects the rights; but the audience and the nature of cases have clearly been much broader and complex. Given such challenges, the regulations must be able to muddle through the changes. Furthermore, the first stage in the admission to the profession also requires a strict evaluation in ascertaining the ethics and individual competency in engaging the responsibility.

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85 Refer to 'ILMC 2014: Chief Justice Exhorts Legal Profession, Defends Legal Judicial Independence in Opening Address' reported by Andrew Khoo (24 September 2014), viewed at http://www.malaysianbar.org.my/international_malaysia_law_conference_2014/opening_address_by_yang_amat_arif_tun_arifin_zakaria_chief_justice_of_ malaysia_ at_the_international_ malaysia_law_conference_2014_royale_chulan_ kuala_lumpur_24_september_2014_.html

86 *Ibid.*

21.6 LEGAL PROFESSION ACT 1976

A Bachelor of Laws qualification would entitle a person to apply for a position in diverse field such as the civil service, foreign-service, police, army and the legal service. However, to qualify as an advocate and solicitor he is expected to fulfil certain additional requirements imposed by the legal profession body. In Malaysia, the legal profession is regulated by the Legal Practice Act 1976 (the 1976 Act). The 1976 Act came into effect on 1 June 1977 replacing the Advocates and Solicitors Ordinance 1947. The 1976 Act is applicable throughout Malaysia.[87]

Being the main regulation to regulate the lawyers throughout the country, the 1976 Act has undergone many amendments since 1977 to 2006 to suit to the changes of legal development in the country. As of now, the latest amendment after 2006 Act takes effect on 3 June 2014 and it is on liberalising legal profession by allowing foreign legal firms to operate in Malaysia.[88] More recently, the Bar Council had spearheaded the drafting of the proposed new Legal profession Act. The draft Act has been submitted to the Attorney General in January 2019 and the said draft document is accessible at the Malaysian Bar website. The 1976 Act is a wide ranging Act that covers most of the affairs of advocates and solicitors. Some of the matters covered by the 1976 Act include qualifications, privileges, remunerations, fees and costs.

The Legal Profession (Practice and Etiquette) Rules 1978

One interesting aspect covered and emphasised in the 1976 Act is the requirement of professional practice, etiquette, conduct and discipline of advocates and solicitors. As much as a judge is bound by certain code of ethics, as discussed above, lawyers are equally bound by certain

87 The Act came into force in West Malaysia on 1 June 1977 *vide* PU (B) 327/77 but has not been extended to Sabah and Sarawak. For Sabah and Sarawak, application of the 1976 Act is with such modification as allowed by the Yang di-Pertuan Agong (s. 2 of the Legal Profession Act 1976).

88 For further reading refer to Liberalisation of Legal Service at http:// www. malaysianbar.org.my/trade_in_legal_services_formerly_ known_ as _ gats/liberalisation_of_legal_services.html

ethics which require them to act professionally particularly on matters relating to their clients. As an officer of the court, the member of the profession 'had an avowed duty to prevent the administration of justice from being imperilled and brought into disrepute.'[89] In *Rondel v. Worsley*,[90] Lord Reid said:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce and by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him."[91]

The ethical aspect in a practising lawyer is emphasised from the very beginning in the law schools and during the period of pupillage. This is where the future lawyers are being taught to act professionally and ethically towards their clients, the judges and fellow lawyers.

The Legal Profession (Practice and Etiquette) Rules 1978 (the 1978 Rules) is a set of rules made by the Bar Council in ensuring that lawyers meet the standard and ethics expected in the profession. It is made pursuant to s. 77 of the Legal Profession Act 1976 which grants to the Bar Council the power to make rules to regulate the practice. The 1978 Rules list down a number of rules that basically intend to regulate the relationship between lawyer and client, the requirement

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89 See *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor* [2011] 1 CLJ 460, CA.

90 [1969] 1 A.C. 191.

91 *Ibid.*, at p 227.

to act independently and professionally, the requirement to respect the court and other important regulations. These rules are binding upon each lawyer. Failure to comply would result in disciplinary action.[92]

21.7 THE MALAYSIAN BAR

In Malaysia, legal profession is a fused profession where a qualified person may be admitted as an advocate and solicitor. This is unlike in the United Kingdom where there a distinction between a barrister and a solicitor.[93] The Malaysian Bar has a membership of approximately 16,000 members of fused legal practitioners for as long as they have valid practising certificates.[94] The membership is increasing by 10-15% yearly.[95] In the Peninsular Malaysia, the professional body that regulates and administers the affairs of the legal practitioners is the Bar Council.

The Bar Council is the body that manages and executes the functions of the Malaysian Bar.[96] There are 38 members of the Bar Council elected annually; the President and Vice President of the Malaysian Bar,[97] the

92 The disciplinary proceedings are elaborated in Part VII of the Legal Profession Act 1976. The Bar Council has also set up rules to elaborate on the proceeding in the Legal Profession (Disciplinary Board) (Procedure) Rules 1994, Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 and Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994.

93 In United Kingdom, a solicitor is the first person that a member of the public will go to for consultation. Whereas, a barrister is the person that a solicitor would refer to for specialist advice. Viewed at http://www.barcouncil.org.uk/becoming-a-barrister/guidance-for- applications/frequently-asked-questions/

94 Legal Profession Act 1976, s. 43. See https://www.malaysianbar.org.my/bar_council.html

95 Information obtained from website http://www.malaysianbar.org.my/past_presidents.html

96 Legal Profession Act 1976, s. 47(1). See also *Majlis Peguam Malaysia v. Yap Min Ch'ng* [2015] 9 CLJ 454.

97 *Ibid*, s. 47(2)(a).

chairman of the twelve State Bar Committees,[98] one member elected by the twelve State Bar Committees to be representatives to the Bar Council and twelve members elected from the Peninsular Malaysia by postal ballots.[99] Sabah and Sarawak however are managed separately whereby for Sabah, management is by the Sabah Law Association and for Sarawak, the Advocates' Association of Sarawak.

Prior to the 1976 Act, the Malaysian Bar through the Bar Council had more power to say of their views and opinions; all for the cause of upholding the justice and protecting not only fellow legal practitioners, but also on behalf of the members of public. At present, the functions and roles[100] of the Malaysian Bar are still wide and extensive; though some powers granted were 'reduced' by subjecting it to 'upon request' through new amendments to the 1976 Act. Nevertheless, some of the functions and powers of the Malaysian Bar include:

(a) upholding the cause of justice without regard to its own interest or the interest of its members, uninfluenced by fear or favour,

(b) maintaining and improving the standards of conduct and learning of the legal profession in Malaysia,

(c) facilitating the acquisition of legal knowledge by members of the legal profession and others,

(d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia,

(e) representing, protecting and assisting members of the legal profession in Malaysia and promote in any proper manner the interest of the legal profession in Malaysia.

98 *Ibid*, s. 47 (2)(c) and s. 70(7).

99 *Ibid*, ss. 47 (2)(c), 50(1) and 51(2).

100 *Ibid*, s. 42(1).

21.8 ADMISSION TO LEGAL PROFESSION

Contrary to the common portrayal of lawyers and legal profession in the media, legal profession is actually a profession that requires daily struggles and high discipline. Lawyers are subjected to much criticism either by the public or the authorities and may even face court actions for failure of disposing proper duties towards the clients. It is a noble profession because the main aim is to help people who are legally troubled by providing them access to justice. Thus, being a lawyer is not at all an easy task especially when dealing with the rights and sometimes life of the people.

Such a huge responsibility requires high knowledge and skills, positive attitudes and good conscience on the part of the practitioners. In order to ensure that future lawyers are ready to survive the challenges, certain strict requirements and regulations are set up. Requirements for admission, regulations in the course of practising or rules when there is a breach are all stipulated in the 1976 Act. Those stipulations are made essential that those who fail to meet the requirements will fail to earn the certificate of practice; or those who breach it, could be cited for disciplinary actions.[101]

In general, an eligible candidate for admission must fulfill the academic, practical and formal requirements as provided in the 1976 Act.

The body which is responsible to conduct courses and monitor the admission of new members to the legal profession is the Legal Profession Qualifying Board Malaysia (the Board). It is established under s. 4[102] of the 1976 Act which empowers it to set up necessary rules and

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101 Part VII of the Legal Profession Act 1976.

102 See s. 5 of the Legal Profession Act 1976 for the functions of the Legal Profession Qualifying Board, which include (a) prescribing qualifications required for the entry of any person into articles with a view to his admission as an advocate and solicitor; (b) providing courses of instruction for, and regulating the training and instruction of, articled clerks; (c) providing for the examination of articled clerks wishing to become qualified persons; (d) to decide on qualifications for 'qualified person'; (e) providing courses of instruction for, and for the examination of persons whose qualifications are not sufficient to make them qualified persons; (f) managing and conducting Bahasa Malaysia Qualifying Examination.

regulations. Section 7 of the 1976 Act states that the Board shall consist of (a) Attorney General as the chairman, (b) two judges nominated by the Chief Justice, (c) the chairman of the Bar Council, (d) a Dean of a Faculty of Law nominated by the Minister of Education. Currently, the Board is chaired by Tan Sri Tommy Thomas, the Attorney General; the two judges are Dato' Setia Mohd Zawawi Salleh and Puan Sri Dato' Zaleha Yusof; Dato' Abdul Fareed Abdul Gafoor, the chairman of Bar Council and Professor Dato' Dr. Johan Shamsuddin Hj Sabaruddin, Dean of Law Faculty, University Malaya (UM).[103]

The admission and qualifications requirements for admission to the Malaysian Bar are contained in ss. 10 to 19 of the 1976 Act and the gazette notifications made from time to time under s. 3 thereof. Section 10 of the Legal Profession Act 1976 explains that one can be admitted as advocate and solicitor at the discretion of the High Court when he is: (a) a qualified person, (b) an articled clerk who has complied with s. 25 of the 1976 Act. Section 3 of the 1976 Act defines qualified person as: (a) a person who has passed the final examination for the law degree in the University of Malaya, University of Malaya in Singapore, the University of Singapore or the National University of Singapore.[104] Section 11 of the 1976 Act further explains that a qualified person must be a person:

(a) who attained the age of eighteen years,

(b) of good character,

(c) a citizen of Malaysia or who holds a permanent resident status in Malaysia,

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103 See http://www.lpqb.org.my/index.php?option=com_content&view=article&id=83&Itemid=79

104 'Qualified persons' is interpreted under s. 3 of the Legal Profession Act 1976 as, among other, possessing qualifications from institutions notified in the Gazette. The Pupillage Handbook 2014 lists down the institutions to include the University of Malaya (UM), National University of Malaysia (UKM), International Islamic University Malaysia (IIUM), MARA University of Technology (UiTM), Universiti Utara Malaysia (UUM), Multimedia University (MMU). It also includes some universities in Australia, New Zealand and the United Kingdom (coupled with the requirement of passing the Certificate in Law Practice (CLP)).

(d) has served the period of pupillage,

(e) exempted or passed the Bahasa Malaysia Qualifying Examination.

The requirement of passing the Certificate in Legal Practice (CLP) examination is made obligatory only for candidates who are:

(a) Malaysian citizens or holding permanent resident status;

(b) citizens of Brunei;

(c) who obtained law degrees in universities in Australia, New Zealand and the United Kingdom recognised by the Legal Profession Qualifying Board Malaysia (the Board), Bachelor of Jurisprudence (B.Juris) in the University of Malaya and Bachelor of Legal Studies in UiTM. The Board is responsible to conduct the CLP examination.

In *Bar Council Malaysia & Anor v. Judy Blacious Af Pereira*,[105] Hamid Sultan Abu Backer JCA delivering the judgment of the court stated:

> "At the outset, we must say that legal profession is a noble profession. Intending and/or practising advocate who has no respect for the rule of law or does not subscribe to the rule of law and/or ethics may not be eligible to be an advocate or continue to be an advocate if so decided by the relevant bodies and/or court within the framework of the Legal Profession Act 1976 (LPA 1976). (See *Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Bar Council Malaysia (Intervener)* [2016] 7 CLJ 667); [2016] 3 AMR 775). A person who qualifies with a law degree need not necessarily be admitted to the Bar if the strict requirements are not fulfilled, though there may not be any prohibition for seeking employment as a non-practising lawyer such as company secretary or lecturer, etc. The trial court must take cognisance that it is in the public interest as well as within the spirit and intent of the LPA 1976 to ensure that those intending advocates who are admitted to the Bar are persons who have subscribed to the rule of law and ethics in their past conduct.

105 [2017] 1 CLJ 32.

> In this respect, the views of the Bar Council or relevant bodies must not be lightly brushed off by the courts in the pretext of equity or fairness, fitting the taste of individual judges. There are a number of bodies including the Bar Council which have been endowed with a statutory right to object. (See s. 16 of the LPA 1976). The court must appreciate that one can become a law graduate but not a practicing lawyer if he cannot satisfy the requirements of the LPA 1976. The test for admission is one of qualification and discipline. Equitable and/or fairness principles, etc. have no role to play in considering a petition for admission within the framework of LPA 1976 and in this respect, previous legislation for admission to the Bar and the case laws under that legislation has no relevance. (See *Re SRC Augustin* [1972] 1 LNS 128; [1973] 1 MLJ 208). The most relevant sections in LPA 1976 for the court to determine if the petitioner is a fit and proper person to be admitted to the Bar according to law and not according to justice and/or fairness are ss. 11 and 16 of the LPA 1976."

Furthermore, the candidate must complete a course of nine months chambering at a legal firm. Many would agree that for the first few months, a chambering pupil would engage in doing clerical works like photocopying documents, typing letters and assisting senior lawyers by carrying files to the court room. Those early tasks are the skills that will accompany every lawyer throughout the career. The pupils will be more involved with lawyer 'works' after their short call; as they will have the rights of audience in the Magistrates Court and in chambers in the High Court.

Generally, the pupils will be involved in handling civil and criminal litigations and non-litigation works.[106] On top of that, the pupils are advised to familiarise themselves with legal practice and acquire as much knowledge as possible. It is very important for every chambering pupil to observe every requirement throughout the term so as to avoid missing any of it. For that purpose, the Bar Council has issued the Pupillage Handbook which provides guidelines for chambering pupils to plan and manage throughout their pupillage.

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106 Pupillage Handbook Directory, Kuala Lumpur Bar Committee, viewed at http://www.klbar.org.my/files/pupillage_handbook_&_directory_(final%20version).pdf

As for Sabah and Sarawak, admission to the profession also requires completion of pupillage for 12 months.[107] Candidates must also meet up certain specific criteria as set out in the Advocates Ordinance of Sabah and Advocates Ordinance of Sarawak. Such criteria include that the candidate must have connection to Sabah or Sarawak, whether by birth, marriage with a resident in Sabah or Sarawak or continuous residence of five or more years; he must currently be domiciled in Sabah or Sarawak; and must serve a three to six months of pupillage in Sabah or Sarawak.[108]

21.9 CONCLUSION

The judiciary and the bar play pertinent roles in ensuring the administration of justice in the country. Thus, the selection and scrutiny that take place in every layer of the process are expected, as such important role of administering justice should not be left in the hands of the unqualified. On top of that, the aspect of impartiality and independence of both judiciary and the bar should be paramount.

In the words of Professor Dame Hazel Genn of University College London:

> Judicial decisions are highly significant for individuals and for the wider society. The daily decisions of the judiciary have a fundamental impact on the liberty, livelihood and reputation of citizens. They have a critical role in making effective legal provisions designed to improve social justice, protect the weak and vulnerable, enforce responsibilities, and maintain social order. The integrity and legitimacy of the legal system depend on the judiciary at all levels having the necessary degree of knowledge and skill to deliver accurate legal decisions by processes that are demonstrably fair and perceived to be so by victims, offenders, litigants, witnesses, the legal profession and the public at large.[109]

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107 Information obtained from websites http://www.lawnet.sabah.gov.my/and http://www.sag.sarawak.gov.my/

108 Candidate who intends to practise in Sabah must complete a mandatory six months pupillage in Sabah.

109 See '*Independence Under Threat*' by Dame Heather Hallet, Bentham Association Presidential Address (2012) UCL Faculty of Laws.